



Court Rejects Use of Affidavits, Continuing Third Circuit's Stringent Ascertainability Requirements

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Key Takeaways:

- Courts in the Third Circuit recognize an implicit ascertainability requirement in Rule 23 that many other circuits do not. Although they permit class members to use affidavits to satisfy the requirement, affidavits must be subject to rigorous screening or be supplemented with additional records or reliable and administratively feasible means.
- A recent decision from the Eastern District of Pennsylvania continues that trend, rejecting a putative class defined using class member affidavits and the defendants' customer email lists.

The Third Circuit is one of a few circuits that recognize an inherent ascertainability requirement in Rule 23. Before a class may be certified, plaintiffs in that circuit must establish that “an ascertainable class [] can be defined using objective criteria and determined using reliable and administratively feasible methods.”^[1] While plaintiffs often rely on defendants' records—such as customer lists or sales records—to identify members of the proposed class, those records are not always sufficient. In those instances, plaintiffs sometimes argue that the class can be identified through “self-identification” affidavits signed by putative class members. Although it is often questionable whether those affidavits are objective and reliable means of identifying class members, the Third Circuit has recognized that they may satisfy the ascertainability requirement in limited circumstances. Specifically, affidavits may suffice if (a) there is a rigorous method for screening fraudulent affidavits or (b) the affidavits are supplemented with additional records or other reliable and administratively feasible means.^[2]

A recent opinion from the Eastern District of Pennsylvania continues the stringent application of the ascertainability requirement in the Third Circuit and highlights the limitations of self-identification affidavits. *Dukich v. IKEA US Retail, LLC*^[3] involved allegations that IKEA US Retail LLC and IKEA North America Services LLC were negligent and violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law in recalling certain chests and dressers they manufactured and sold in their stores. The plaintiffs alleged that the IKEA merchants failed to notify them and a putative class of purchasers of the recall, despite having their email addresses. They defined the proposed class as purchasers who had no notice of the recall, bought one of the chests or dressers subject to the recall, and for whom the defendants had an email address on file, and argued that class members could be defined using affidavits and the defendants' customer records.

In denying class certification, the court rejected the plaintiffs' reliance on affidavits and the defendants' customer email records to identify class members who were not aware of the recall. The court explained that the Third Circuit has required "'thousands of pages of contracts, driver rosters, security gate logs, and pay statements' in addition to affidavits to determine a class of full-time drivers for a corporate defendant."^[4] In *Dukich*, because "customers were not notified about the recall only via emails" and "may have been notified about the recall through a method other than email but not remember that they received notice at some point over the past six years," the court held it was necessary for plaintiffs to put forward "evidence to supplement affidavits beyond the email addresses IKEA has on file."^[5] "A purported class member's memory alone is not sufficiently reliable for this purpose" absent "additional evidence that could prove lack of notice."^[6]

This decision correctly recognizes the limitations of self-identification affidavits and continues the stringent ascertainability requirements applied in the Third Circuit. This is in contrast with other circuits—including the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh—that have taken a different approach. ^[7]

[1] *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

[2] *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017).

[3] 2022 WL 17823684 (E.D. Pa. Dec. 20, 2022).

[4] *Id.* at *5 (quoting *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470, 480 (3d Cir. 2020)).

[5] *Id.*

[6] *Id.*

[7] *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302, 1304 (11th Cir. 2022) (rejecting approach to ascertainability requiring proof of administrative feasibility, and noting agreement with Second, Sixth, Seventh, Eighth, and Ninth Circuits).

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